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STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
MICHAEL L. JOHNSON, D.C.,	:	LS9709251CHI
APPLICANT.	:	

The State of Wisconsin, Chiropractic Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Chiropractic Examining Board

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 23rd day of April 1998.

Terry K. Shetzg, D.C.
A Member of the Board

STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST

MICHAEL L. JOHNSON, D.C.

LS9709251CHI

Respondent

PROPOSED DECISION

The parties to this proceeding for the purposes of Wis. Stats. sec. 227.53, Stats., are:

Michael L. Johnson, D.C.
1713 South Oneida Street
Appleton, WI 54915

State of Wisconsin Chiropractic Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

State of Wisconsin Dept. of Regulation & Licensing
1400 East Washington Avenue
P.O. Box 8935
Madison, WI 53708

This matter was commenced by the filing of a formal Complaint on September 24, 1997. A hearing in the matter was conducted on January 8, 1998, at 1400 East Washington Avenue, Madison, Wisconsin. Appearing for complainant was Attorney James E. Polewski. Dr. Johnson appeared in person and by Attorney John C. Peterson. The transcript of the proceedings was received on February 9, 1998.

Based upon the entire record in this case the administrative law judge recommends that the Chiropractic Examining Board adopt as its final decision in the matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Michael L. Johnson, D.C., 1713 South Oneida Street, Appleton, Wisconsin 54915, (respondent) was granted a license to practice as a chiropractor in Wisconsin by license #1822, granted on May 14, 1983.

2. License renewal applications for the biennial period beginning on January 1, 1997, and ending on December 31, 1998, were mailed to all licensed chiropractors, including respondent in early November, 1996.

3. The renewal application for the 1997-98 biennium sent to respondent at his address of record in November, 1996, was either not received by respondent or was overlooked by him or his staff. Consequently, the renewal application was not returned, and respondent inadvertently practiced without a current registration from January 1, 1997, until August 18, 1997.

4. The Division of Enforcement became aware that respondent had failed to renew his license not later than June 23, 1997. The Division failed to notify respondent of his inadvertent failure to renew until August 18, 1997.

5. Upon notification to respondent's attorney, John C. Peterson, that respondent was practicing without a current registration, Mr. Peterson immediately notified Respondent of the oversight, and respondent immediately suspended his practice.

6. Upon being notified on August 18, 1997, of his failure to renew, respondent submitted a renewal application along with the required renewal fee on August 19, 1997, and his license was renewed on that date.

7. While respondent failed to renew his license on a timely basis, he had completed continuing education required under sec. 446.02(1)(b), Stats., on a timely basis and, at all times material hereto, maintained professional liability insurance required by sec. 446.02(8), Stats., in the amounts specified in sec. Chir 3.07, Code.

CONCLUSIONS OF LAW

1. The Chiropractic Examining Board has jurisdiction in this matter under sec. 446.03 and 446.04, Stats.

2. Under sec. 440.08(1), Stats., failure to receive a notice of renewal is not a defense in any disciplinary proceeding against a license holder for practicing without a credential.

2. In having practiced chiropractic without a current registration between January 1, 1997, and August 18, 1997, respondent has violated sec. Chir 6.02(26), Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that Michael L. Johnson, D.C., be, and hereby is, reprimanded.

IT IS HEREBY FURTHER ORDERED that partial costs of the prosecution of this matter in the amount of \$75.00 shall be assessed against Michael L. Johnson, D.C.

OPINION

The facts in this matter are not in dispute. Respondent does not deny either that a renewal application was mailed to him in early November, 1996, that he failed to renew at that time, or that he continued to practice until notified of that failure on August 18, 1997. Complainant does not contend that the failure to renew was anything but inadvertent, and admits that, though complainant was aware as early as June 23, 1997, of respondent's failure to renew, no action was taken to notify respondent of that failure until August 18, 1997.

It is also undisputed in this record that failure of chiropractors to renew their licenses on schedule is a common situation, with as many as twenty-five percent of licensees failing to do so in any given renewal cycle. Finally, the record is clear that the resolution of the three previous cases where disciplinary action was taken against chiropractors who had inadvertently practiced without a current registration was that they be reprimanded and, in two cases, assessed costs and/or forfeitures in the amounts of \$75.00 and \$125.00, respectively.¹

Notwithstanding these facts, the Division of Enforcement seeks discipline in this case including suspension of the license for six weeks (one week for each month of practice without a current registration, less the two months of unlicensed practice during which the Division was aware of respondent's failure to renew but didn't bother to let him know); and limitations on respondent's license to require that he notify all patients treated during the period of unlicensed practice of such unlicensed practice, that he offer to refund all fees charged to such patients, and that he place a sign on the door to his clinic notifying all patients of the nature of the disciplinary proceeding and of the discipline imposed. The division also asks that all costs associated with prosecution of the matter be assessed against the respondent. The Division justifies such onerous discipline on the basis that failure of chiropractors to renew on schedule is a "pervasive problem," that the standard discipline of a reprimand and assessment of \$75 of the costs has failed to alleviate the problem, and that such discipline is necessary to subserve the disciplinary objective of deterring other licensees from failing to timely renew. The suggested requirement

¹ In Disciplinary Proceedings Against Esenberg, the board found on January 13, 1994, that Dr. Esenberg had practiced without a current registration from December 31, 1992, until November 17, 1993. He was reprimanded, and ordered to pay a forfeiture of \$50 and partial costs in the amount of \$75. Also on January 13, 1994, the board reprimanded Brian Grotz, D.C., for practicing without a current registration between December 31, 1992 and August 18, 1993. He received only a reprimand. In Disciplinary Proceedings Against Leonhard, the board on February 10, 1994, imposed a reprimand and a \$75 forfeiture for practicing without a current registration for nearly two and one-half years. The record does not disclose the basis for the board's brief flurry of activity in this area in early 1994.

that respondent refund the fees is necessary, according to the Division, to subserve the disciplinary objective of protecting the public. While stopping short of asserting that respondent's malpractice carrier would not pay claims arising during the period when respondent was not currently registered, complainant suggested as much at hearing, stating, "The state is unaware of any policy of professional liability insurance that will cover an act of any professional who is not properly licensed or practicing within the laws of the jurisdiction."

Respondent characterizes the Division's suggestion that respondent's malpractice coverage would be interrupted during the period of practice prior to renewal as "absurd." He otherwise characterizes the Division's suggested discipline as "Draconian."

As to the question whether respondent's malpractice carrier would pay for malpractice claims occurring during the period of unlicensed practice, there is no evidence in this record whether such payment would or would not be made, other than the assertions of the parties. As to whether the discipline suggested by the Division may be termed "Draconian," it is so much more onerous than what the board has imposed in the past for simple inadvertent failure to timely renew, that it does indeed seem to be of such unusual harshness as to fall within that definition.²

There might possibly be circumstances that would justify such a harsh set of penalties, though it is difficult to envision any such circumstances that would not involve a great deal more than a simple failure to renew a valid license -- even if the failure to renew was intentional and long-standing. In this case, of course, the failure to renew was without question nothing more than an oversight by respondent's office staff, and was remedied as soon as practicable upon respondent's notification of the oversight. In fact, upon such notification, respondent immediately stopped practicing and did not resume practice until his receipt of official notification that his license had been renewed.

Other than complainant's reference to some possible problem with respondent's malpractice insurance coverage, one searches complainant's final argument in vain for some assertion of grave public harm arising from respondent's oversight or, for that matter, some assertion of grave public harm arising from failure of chiropractors to timely renew in general. It would in fact be somewhat difficult for complainant to make such an assertion. When the Division learned of respondent's failure to renew on June 23, 1997, their only action was to determine whether respondent was continuing to practice. The Division didn't get around to notifying respondent of his failure to renew until almost two months later, on August 18, 1997.


One is inclined toward the conclusion that there is something more operating here than a zealous concern for the public's safety, and that conclusion is reinforced by the extensive discovery conducted in a case where the underlying facts were never really in question. A careful reading of the entire record in the matter, and the many inferences one can draw therefrom, is instructive in terms of the nature of the interactions between the parties hereto. Suffice it to say that nothing

² "Exceedingly harsh; rigorous: a *draconian* penalty. [After *Draco*, Athenian lawgiver of the 7th century BC, whose laws were proverbially harsh.]" The American Heritage Dictionary, Second College Edition, Houghton Mifflin Company, 1985.

in that record supports treating this respondent differently from the few other licensees who have been disciplined for failure to renew on time, and very little to support treating him differently from the approximately 25 percent of chiropractors whose failure to renew on a timely basis is routinely overlooked.

Dated this 24th day of February, 1998.

respectfully submitted,



Wayne R. Austin
Administrative Law Judge

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STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
BEFORE THE CHIROPRACTIC EXAMINING BOARD

In the Matter of Disciplinary Proceedings Against

Michael L. Johnson, D.C.,

AFFIDAVIT OF MAILING

Applicant.


STATE OF WISCONSIN)
)
COUNTY OF DANE)

I, Kate Rotenberg, having been duly sworn on oath, state the following to be true and correct based on my personal knowledge:

1. I am employed by the Wisconsin Department of Regulation and Licensing.

2. On April 27, 1998, I served the Final Decision and Order dated April 23, 1998, LS9709251CHI, upon the Applicant Michael L. Johnson's attorney by enclosing a true and accurate copy of the above-described document in an envelope properly stamped and addressed to the above-named Applicant's attorney and placing the envelope in the State of Wisconsin mail system to be mailed by the United States Post Office by certified mail. The certified mail receipt number on the envelope is P 221 159 455.

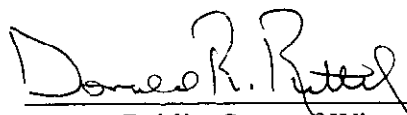
John C. Peterson, Attorney
200 E. College Avenue
P.O. Box 5159
Appleton WI 54913-5159



Kate Rotenberg
Department of Regulation and Licensing
Office of Legal Counsel

Subscribed and sworn to before me

this 27th day of April, 1998.



Notary Public, State of Wisconsin
My commission is permanent.

NOTICE OF RIGHTS OF APPEAL

TO: JOHN C PETERSON ATTY

You have been issued a Final Decision and Order. For purposes of service the date of mailing of this Final Decision and Order is 4/27/98. Your rights to request a rehearing and/or judicial review are summarized below and set forth fully in the statutes reprinted on the reverse side.

A. REHEARING.

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in section 227.49 of the Wisconsin Statutes. The 20 day period commences on the day of personal service or the date of mailing of this decision. The date of mailing of this Final Decision is shown above.

A petition for rehearing should name as respondent and be filed with the party identified below.

A petition for rehearing shall specify in detail the grounds for relief sought and supporting authorities. Rehearing will be granted only on the basis of some material error of law, material error of fact, or new evidence sufficiently strong to reverse or modify the Order which could not have been previously discovered by due diligence. The agency may order a rehearing or enter an order disposing of the petition without a hearing. If the agency does not enter an order disposing of the petition within 30 days of the filing of the petition, the petition shall be deemed to have been denied at the end of the 30 day period.

A petition for rehearing is not a prerequisite for judicial review.

B. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in section 227.53, Wisconsin Statutes (copy on reverse side). The petition for judicial review must be filed in circuit court where the petitioner resides, except if the petitioner is a non-resident of the state, the proceedings shall be in the circuit court for Dane County. The petition should name as the respondent the Department, Board, Examining Board, or Affiliated Credentialing Board which issued the Final Decision and Order. A copy of the petition for judicial review must also be served upon the respondent at the address listed below.

A petition for judicial review must be served personally or by certified mail on the respondent and filed with the court within 30 days after service of the Final Decision and Order if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing. Courts have held that the right to judicial review of administrative agency decisions is dependent upon strict compliance with the requirements of sec. 227.53 (1) (a), Stats. This statute requires, among other things, that a petition for review be served upon the agency and be filed with the clerk of the circuit court within the applicable thirty day period.

The 30 day period for serving and filing a petition for judicial review commences on the day after personal service or mailing of the Final Decision and Order by the agency, or, if a petition for rehearing has been timely filed, the day after personal service or mailing of a final decision or disposition by the agency of the petition for rehearing, or the day after the final disposition by operation of the law of a petition for rehearing. The date of mailing of this Final Decision and Order is shown above.

The petition shall state the nature of the petitioner's interest, the facts showing that the petitioner is a person aggrieved by the decision, and the grounds specified in section 227.57, Wisconsin Statutes, upon which the petitioner contends that the decision should be reversed or modified. The petition shall be entitled in the name of the person serving it as Petitioner and the Respondent as described below.

SERVE PETITION FOR REHEARING OR JUDICIAL REVIEW ON:

STATE OF WISCONSIN CHIROPRACTIC EXAMINING BOARD

1400 East Washington Avenue

P.O. Box 8935

Madison WI 53708-8935